ADZLI SAMSUDIN & ANOR.

v.

TANAH RAYA KILANG BATU SDN. BHD. & ANOR.

HIGH COURT MALAYA, JOHOR BAHRU
L.C. VOHRAH J
[CIVIL SUIT NO. 111 OF 1984]
6 SEPTEMBER 1989

TORT: *Damages - Right leg shortened by 3 cm - Pain & suffering - Loss of earning capacity.*

1st plaintiff was knocked into when he was about 6 feet away from the left edge of a 31 feet wide straight road. The 2nd defendant was a lorry driver whose testimony in Court contradicted his statements in the police report.

The 1st plaintiff suffered a shortening of the right leg by 3 cm and the movements in the foot were reduced. The ankle points downward resulting in he walking on his toes on the right side. He would suffer pain when standing or walking for long periods, and he would not be able to partake in games and prospects in respect of outdoor employment would be hindered. He would have a deformed and small foot. Infection may damage the remaining bones in the foot. The function in the foot has been reduced by 80%.

Held:

[1] The 2nd defendant was liable for the accident as he was not keeping a proper lookout and failed to see the 1st plaintiff crossing the road.

[2] The following awards were made:

(a) General damages

(i) Pain and suffering and loss of amenities - RM35,000

(ii) Loss of earning capacity - RM15,000

(b) Special damages - RM952 (agreed sum)

(c) Interest

(i) Pain and suffering - 8% per annum from date of service of writ.

(ii) Special damages - 4% per annum from date of accident.

[Order accordingly.]

Cases referred to:

Tan Diang Boo & Anor. v. Lim Hai Phang & Anor. [1988] MLJ xxxvii
Abdullah bin Ahmad v. Cheng Meng Chee [1988] MLJ xxxvii
Musa bin Putih v. Tai Sai Leng & Anor. [1988] MLJ xxxviii
Ramasivam & Anor. v. Abdul Aziz & Ors. [1976] MLJ 91

For the plaintiffs - C.S. Tam; M/s. C.K. Tam & Co.
For the defendants - C. Nicholson; M/s. V.P. Nathan & Partners

JUDGMENT

LC Vohrah J:

Of the two versions of the accident, I find that given by the second plaintiff to be more probable. Her version was that the first plaintiff was walking close behind her and that it was only after she had crossed over to the other side of the road that she heard the sound of screeching tyres and found, when she looked behind her, that the first plaintiff had been knocked into. The sketch plan bears her story out as it shows that the first plaintiff was knocked into when he was only about 6 ft. away from the left edge of the 31-foot wide road. As it was a very straight stretch of road the driver of the lorry, the second defendant, if he had kept a proper look-out, would clearly have seen the first plaintiff when he was very much further away than 16 feet whence, he said, he first sighted the first plaintiff crossing the road from his right to the left. It was obvious that he was driving his lorry either very fast or that he was not exercising due care and attention whilst driving on the road. His version cannot also be relied upon because his statement in evidence that the first plaintiff was crossing from the right side of the road to the left side contradicts the statement in his police report that the first plaintiff was actually crossing from the left side of the road to the right side when, he stated, he tried to avoid knocking into him. He was on the whole a hazy witness who did not seem to remember clearly the events of the accident. He even testified that his report was made on the very day of the accident although it was obviously lodged at 1.40p.m. on 10 October 1982, one day after the accident. I am satisfied on the evidence available that the second defendant was responsible for the accident as he was not keeping a proper look-out and thereby failed to see the first plaintiff crossing the road. I accordingly find him entirely to blame.

As regards damages, I have considered the report of the consultant orthopaedic surgeon at AB2-3. According to this report the first plaintiff has suffered an effective shortening of the right leg by 3 cm. In the opinion of the consultant orthopaedic surgeon, the first defendant now has a foot in which the movements are grossly reduced. The ankle is pointing downward with the result that he cannot bear weight through the whole of the sole of the foot. This means that on the right side he would be walking on his toes. This deformity would rob him of a stance and he would tend to fall very easily especially when running. His ability to balance himself when walking along narrow pathways would be grossly reduced. This deformity would also cause him pain when walking or standing for long periods. His capacity to partake in games has been reduced to almost nil. In later years these disabilities would hinder his employment prospects especially those of an outdoor nature. Further the deformed bones and the complete disappearance of some of the tarsal bones would ensure that he would have only a deformed and small foot when compared with his other normal foot. The infective process that is apparently going on may damage the remaining bones in that foot. He has lost the fat pad and tough skin that cover the heel in a normal person and now has only a thin skin adhering to the bone. Attempts to bear weight on this maximum weight-bearing area would apparently inevitably lead to ulceration and infection. The function in this foot is considered to have been reduced by 80%.

Having regard to the authorities that have been submitted to me by both sides, namely *Tan Diang Boo & Anor. v. Lim Hai Phang & Anor.* [1988] MLJ xxxvii, *Abdullah bin Ahmad v. Cheng Meng Chee* [1988] MLJ xxxvii, *Musa bin Putih v. Tai Sai Leng & Anor.* [1988] MLJ xxxviii, and *Ramasivam & Anor. v. Abdul Aziz & Ors.* [1976] MLJ 91, I award the sum of RM35,000 as general damages for pain and suffering and loss of amenities. This sum will bear interest at the rate of 8% per annum from the date of the service of the writ.

It is always difficult to assess the loss of future earnings with regard to an infant but it is common ground in this case that a lump sum should be given for loss of earning capacity. In the circumstances, I think the sum of RM15,000 suggested by Counsel for the defendants for loss or earning capacity is fair and reasonable and I award this sum which will bear no interest.

Special damages have been agreed at RM952 which sum will bear interest at the rate of 4% per annum from the date of the accident.

Costs to be agreed or taxed.

Also found at [1990] 1 CLJ 56